IN THE

SUPREME COURT OF THE UNITED STATES

No. 77-1229

GARY GEORGE HUFFMAN, Individually, As Administrator of the Estate of Jane Todd Huffman, Deceased, and As Next Friend of Shannon Michele Huffman, An Infant - **Appellant**

versus

COMMONWEALTH OF KENTUCKY, DEPARTMENT OF HIGHWAYS and DEPARTMENT OF NATURAL RESOURCES - **Appellees**

On Appeal from the Court of Appeals of Kentucky

MOTION TO DISMISS OR AFFIRM

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v.

COMMONWEALTH OF KENTUCKY, DEPARTMENT OF HIGHWAYS and DEPARTMENT OF NATURAL RESOURCES - *Appellees*

ON APPEAL FROM THE COURT OF APPEALS OF KENTUCKY

MOTION TO DISMISS OR AFFIRM

Appellees move the Court to dismiss the appeal herein or, in the alternative, to affirm the judgment of the Court of Appeals of Kentucky on the ground that it is manifest that the issues on which the decision of the case depends do not present substantial federal questions.

JURISDICTION

Appellant invokes the jurisdiction of this Court under 28 U.S.C. § 1257(2), to which appellees object because appellant's rights to equal protection and due process under the Constitution of the United States

are not violated by the application of the doctrine of sovereign immunity as embodied by § 231 of the Kentucky Constitution.

STATUTORY PROVISIONS INVOLVED

§ 231 of the Kentucky Constitution reads:

> "The general assembly may, by law, direct in what manner and in what courts suits may be brought against the Commonwealth."

QUESTIONS PRESENTED

I. **Whether or Not the Doctrine of Sovereign Immunity, as Embodied in § 231 of the Kentucky Constitution, Is Violative of the Equal Protection Clause of the United States Constitution?**

II. **Whether or Not the Doctrine of Sovereign Immunity, as Embodied in § 231 of the Kentucky Constitution, Is Violative of the Due Process Provisions of the United States Constitution?**

STATEMENT OF THE CASE

Appellant filed suit in Franklin Circuit Court against the Commonwealth of Kentucky (Appellant's Appendix A). The Commonwealth's motion to dismiss, pursuant to § 231 of the Kentucky Constitution, was granted (Appellant's Appendix B) and he appealed to the Court of Appeals of Kentucky. The Court of Appeals of Kentucky upheld the dismissal (Appellant's Appendix C), and discretionary review was denied by the Supreme Court of Kentucky (Appellant's Appendix D).

ARGUMENT

I. The Doctrine of Sovereign Immunity, as Embodied in § 231 of the Kentucky Constitution, Is Not Violative of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

Contrary to what is urged by appellant, it has been well settled since the case of *Palmer* v. *Ohio,* 248 U. S. 32 (1918) that the question of state governmental immunity is not one for review by this Court. The argument that the doctrine of sovereign immunity violates the equal protection clause of the Fourteenth Amendment has been rejected by each Court confronted with the argument. This Court has on at least three recent occasions dismissed appeals involving this issue. *Krause* v. *State,* 28 Ohio App. 2d 1, 274 N. E. 2d 321 (1971), reversed 31 Ohio St. 2d 132, 285 N. E. 2d 736 (1972), appeal dismissed sub nom. *Krause* v. *Ohio,* 409 U. S. 1052, 34 L. Ed. 2d 506, 93 S. Ct. 557 (1972), reh. denied 410 U. S. 918, 35 L. Ed. 2d 280, 93 S. Ct. 959 (1973); *Berry* v. *Hinds County, Mississippi,* 344 So. 2d 146 (Miss. 1977), cert. denied —— U. S. ——, 98 S. Ct. 114, 54 L. Ed. 2d 91 (1977); *Brown* v. *Wichita State University,* 217 Kan. 661, 538 P. 2d 713 (1975), reversed en banc on motion for rehearing 219 Kan. 2, 547 P. 2d 1015 (1976), appeal dismissed sub nom. *Bruce* v. *Wichita State University,* 429 U. S. 806, 97 S. Ct. 41, 50 L. Ed. 2d 67 (1976).

Numerous state court decisions have considered and rejected the equal protection argument. Representative cases include:

In *Swafford* v. *City of Garland,* 491 S. W. 2d 175 (Tex. Civ. App. 1973) Swafford sued the City in tort found on malicious prosecution. The trial court granted the City's motion for summary judgment based on the doctrine of sovereign immunity. The Texas Court of Civil Appeals affirmed stating:

> "We find no merit in his [Swafford's] contention that the application of the doctrine of sovereign immunity in this case is offensive to the equal protection and due process clauses of the State and Federal Constitutions. . . ." 491 S. W. 2d at 176.

In *Sousa* v. *State,* 341 A. 2d 282 (N.H. 1975) Sousa and Evans sued for injuries they sustained when the State-owned-and-maintained bridge over which they were driving collapsed. The State filed motions to dismiss on the ground of sovereign immunity. The motions were granted. On appeal the New Hampshire Supreme Court rejected the plaintiffs' constitutional arguments stating:

> ". . . Nor does it constitute a violation of plaintiffs' rights to equal protection as all those who are similarly situated are similarly treated. . . . In short, we hold that there is no constitutional provision which confers on the plaintiffs a right to sue and hold the State liable for a tort. . . ." 341 A. 2d at 285.

In *Hall* v. *Powers,* 6 Pa. Cmwlth. 544, 296 A. 2d 535 (1972), aff'd 311 A. 2d 612 (Pa. 1973), wherein a complaint in trespass had been filed against the Commonwealth and a Commonwealth employee, the Commonwealth Court of Pennsylvania stated:

> "The plaintiff . . . has raised the issue here that Pennsylvania's doctrine of sovereign immunity constitutes a denial of equal protection and due process under the United States Constitution by creating two classes of litigants: those who have a cause of action because injured by a private tortfeasor, and those whose cause of action is barred by sovereign immunity. In Duquesne, supra [Duquesne Light Co. v. Dept. of Transportation, Pa. Cmwlth., 295 A. 2d 351 (filed Oct. 2, 1972)], however, this Court specifically rejected that contention." 296 A. 2d at 536.

The Court sustained the Commonwealth's preliminary objections and dismissed plaintiff's complaint. The Supreme Court of Pennsylvania [311 A. 2d 612] affirmed the order of the lower court.

In *Knapp* v. *City of Dearborn,* 60 Mich. App. 18, 230 N. W. 2d 293 (1975), a tort action against a city, the plaintiff contended among other things that the Michigan governmental immunity statute was unconstitutional because "its application unreasonably burdens free access to the courts" and "it creates an arbitrary distinction between tortfeasors and injured persons." 230 N. W. 2d at 294. The Michigan court rejected the plaintiff's constitutional argument.

Crowder v. *Department of State Parks,* 228 Ga. 436, 185 S. E. 2d 908 (1971), cert. denied sub nom. *Crowder* v. *Georgia,* 406 U. S. 914 (1972) was an action on behalf of a minor injured by a fall in a state park.

The defendants—the State of Georgia, the Department of State Parks of Georgia, its Director, and the Superintendent of Cloudland Canyon State Park—interposed the defense that the amended complaint failed to state a claim upon which relief could be granted and sovereign immunity. The trial court dismissed the action stating "there is no statute authorizing the suit against the State or its Department of State Parks and for this reason the case is dismissed. . . ." 185 S. E. 2d at 910. The Court of Appeals affirmed the trial court. The Supreme Court of Georgia granted the plaintiff's application for certiorari and in a decision affirming the judgment of the lower court held that the abrogation of the doctrine of sovereign immunity was a matter of public policy for action by the legislature, not the judiciary. As to the equal protection and due process arguments made by the plaintiff, the Georgia Supreme Court stated: "It [the doctrine of sovereign immunity] does not, we unhesitatingly hold, violate either the State or Federal Constitution." 185 S. E. 2d at 911. See also *Azizi* v. *Bd. of Regents of the Uni. System of Ga.*, 132 Ga. App. 384, 208 S. E. 2d 153 (1974), aff'd 233 Ga. 487, 212 S. E. 2d 627 (1975).

This Court in *Palmer, supra,* in rejecting the contention, stated:

> "The rights of individuals to sue a state, in either a Federal or a state court, cannot be derived from the Constitution or laws of the United States. It can only come from the consent of the state." 248 U. S. at 34.

In *Reed* v. *Reed,* 404 U. S. 71 (1971), wherein the equal protection clause was under discussion, the court stated:

> "In applying that clause, this Court has consistently recognized that the Fourteenth Amendment does not deny to States the power to treat different classes of persons in different ways. . . ." 404 U. S. at 75.

The Court also stated in *Tigner* v. *Texas,* 310 U. S. 141 (1940):

> ". . . The Constitution does not require things which are different in fact or opinion to be treated in law as though they were the same. . . ." 310 U. S. at 147.

16 Am. Jur. 2d Constitutional Law, section 533 (1964) reads:

> "It is a general rule that equal protection of the laws is not denied by a course of procedure which is applied to legal proceedings in which a particular person is affected, if such a course would also be applied to any other person in the state under similar circumstances and conditions.
>
> "Equal protection of the laws of a state is extended to persons within its jurisdiction, within the meaning of the Fourteenth Amendment to the Federal Constitution, when its courts are open to them on the same condition as to others in like circumstances, with like rules of evidence and modes of procedure, for the security of their persons and property, the prevention and redress of wrongs, and the enforcement of contracts."

§ 231 is not, on its face, discriminatory for it creates no classification. Without enabling legislation it is an absolute bar to all suits against the Commonwealth. With regard to the enabling legislation, all persons similarly situated are treated similarly. Any claim against the Commonwealth must be made in the Board of Claims,[1] which is open to the claimant on the same conditions as to others in like circumstances and where the same rules of evidence and modes of procedures are available to those similarly situated. Persons who seek recovery for the alleged negligence of a state employee are entitled to seek recovery against the employee individually in court and are not compelled to prosecute their claim before the Board of Claims.

The purpose of the enabling legislation creating the Board of Claims was not to grant a cloak of immunity behind which all employees of the Commonwealth could hide from their individual responsibility for their alleged negligent acts, but was to partially waive im-

[1]KRS 44.070(1):

"A board of claims, composed of the members of the crime victims compensation board as hereinafter provided, is created and vested with full power and authority to investigate, hear proof, and to compensate persons for damages sustained to either person or property as a proximate result of negligence on the part of the Commonwealth, any of its departments or agencies, or any of its officers, agents or employes while acting within the scope of their employment by the Commonwealth or any of its departments or agencies; provided, however, regardless of any provision of law to the contrary, the Commonwealth, its departments and agencies, and its officers, agents and employes, while acting within the scope of their employment by the Commonwealth or any of its departments or agencies, shall not be liable for pain or suffering, and compensation shall not be allowed, awarded, or paid for pain or suffering. Except as herein provided the board shall be independent of all agencies and departments of the Commonwealth except as provided in KRS 44.070 to 44.160."

munity by reason of sovereignty and to facilitate the processing of claims against the state.

Furthermore, persons who seek recovery in negligence against private tort-feasors are different from those who seek recovery for negligence against the Commonwealth. They are not similarly situated and may be treated differently. Appellant is not denied the opportunity to seek recovery because of race or sex or financial status. The legislation does not single out any discrete and insular minority or any group defined by immutable characteristics. All persons who seek recovery in negligence from the Commonwealth are, without regard to any classification, treated the same.

Appellant attempts to create a classification by pointing to the remedy available by those who enter into contracts with the Commonwealth.[2] These persons are differently situated with different causes of actions. Their recovery is limited to the amount of the contract previously and voluntarily entered into by both the Commonwealth and the person.

Clearly, as shown above, the doctrine of sovereign immunity as embodied in § 231 of the Kentucky Con-

[2]KRS 44.270:

"(1) Any person, firm or corporation, having a lawfully authorized written contract with the Commonwealth at the time of or after June 21, 1974, may bring an action against the Commonwealth on the contract, including but not limited to actions either for breach of contracts or for enforcement of contracts or for both. Any such action shall be brought in the Franklin Circuit Court and shall be tried by the court sitting without a jury. All defenses in law or equity, except the defense of governmental immunity, shall be preserved to the Commonwealth.

(2) If damages awarded on any contract claim under this section exceed the original amount of the contract, such excess shall be limited to an amount which is equal to the amount of the original contract."

stitution is not violative of the equal protection clause of the United States Constitution and the appeal should be dismissed.

II. The Doctrine of Sovereign Immunity, as Embodied in § 231 of the Kentucky Constitution, Is Not Violative of the Due Process Provisions of the United States Constitution.

Many of the cases cited under Point I considered the question of whether or not the doctrine of sovereign immunity is offensive to the due process clauses of the United States Constitution. Each case held such immunity was not violative of due process. *Swafford* v. *City of Garland, supra; Hall* v. *Powers, supra;* and *Crowder* v. *Department of State Parks, supra.* See also *Snow* v. *Freeman,* 55 Mich. App. 84, 222 N. W. 2d 43 (1974). The due process question was specifically raised before the United States Supreme Court in *Palmer* v. *Ohio, supra,* which involved sovereign immunity, and the Court specifically held that the case raised no federal question.

In its opinion on the motion for rehearing in *Brown* v. *Wichita State University, supra,* the Kansas Supreme Court addressed itself to the question of whether constitutional due process was violated by K.S.A. 46-901, et seq., the Kansas statute that established governmental immunity. The Court held that K.S.A. 46-901, et seq., violated no provisions of the United States Constitution. The Court stated:

> "The court has been cited to no case where constitutional due process has been used as a basis for the abrogation of legislatively imposed governmental immunity." 547 P. 2d at 1031.

To support their argument, appellant cites *Boddie* v. *Connecticut,* 401 U. S. 371 (1971). The ruling in *Boddie* is limited as the Court said:

> "We do not decide that access for all individuals to the courts is a right that is, in all circumstances, guaranteed by the Due Process Clause of the Fourteenth Amendment so that its exercise may not be placed beyond the reach of any individual, for, as we have already noted, in the case before us this right is the exclusive precondition to the adjustment of a fundamental human relationship. The requirement that these appellants resort to the judicial process is entirely a state-created matter. Thus we hold only that a State may not, consistent with the obligations imposed on it by the Due Process Clause of the Fourteenth Amendment, pre-empt the right to dissolve this legal relationship without affording all citizens access to the means it has prescribed for doing so." 401 U. S. at 382-383.

This position was reemphasized in *United States* v. *Kras,* 409 U. S. 434 (1973). Kras contended as does appellant that his case fell squarely within *Boddie.* In rejecting this, the Court relied on the above statement in *Boddie.* 409 U. S. at 450. Appellee submits that *Boddie* does not support the proposition that constitutional due process may be used as a basis for the abrogation of sovereign immunity.

No denial of due process exists as a result of a partial waiver of sovereign immunity. As Mr. Justice Brandeis stated long ago in *Tutun* v. *United States,* 270 U. S. 568 (1925):

> "The United States may create rights in individuals against itself, and provide only an administrative remedy. (citation omitted) It may provide a legal remedy, but make resort to the courts available only after all administrative remedies have been exhausted. (citations omitted) It may give to the individual the option of either an administrative or a legal remedy. (citations omitted) Or it may provide only a legal remedy. (citation omitted)" 270 U. S. at 576-577.

Also, in *McElrath* v. *United States,* 102 U. S. 426 (1880):

> "The Government cannot be sued, except with its own consent. It can declare in what court it may be sued, and prescribe the forms of pleading and rules of practice to be observed in such suits. It may restrict the jurisdiction of the Court to a consideration of only certain classes of claims against the United States." 102 U. S. at 440.

Kentucky's partial waiver of sovereign immunity is an expansion of individual rights.[3] It is the conferring of an economic benefit by the people of Kentucky upon those who have a moral claim against the people. The conferment, however, is not sufficient to create the right in appellant to bring the action he sought to bring.

[3]Kentucky provides far greater procedural safeguards in the administrative setting than are required by the Fourteenth Amendment as are articulated by *Withrow* v. *Larkin,* 421 U. S. 35 (1975). See, *American Beauty Homes Corp.* v. *Louisville and Jefferson County Planning and Zoning Commission,* 379 S. W. 2d 450 (Ky. 1964); *Gentry* v. *Ressnier,* 437 S. W. 2d 756 (Ky. 1969); *City of Louisville* v. *McDonald's,* 470 S. W. 2d 173 (Ky. 1971); and *City of Northfield* v. *Holiday Manor, Inc.,* 479 S. W. 2d 596 (Ky. 1972).

§ 231 of the Kentucky Constitution is not, on its face, violative of due process of law for it neither mandates procedure or the taking of life, liberty or a vested property right. Nor do the legislative enactments under its authority act to deny due process of law.

CONCLUSION

The appellees respectfully submit that the questions presented raise no federal constitutional right and are so unsubstantial as not to need further argument; and appellees respectfully move the Court to dismiss this appeal or, in the alternative, to affirm the judgment entered in the cause by the Court of Appeals of Kentucky.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Victor Fox, one of counsel for appellees, hereby certify that the foregoing Motion to Dismiss or Affirm was served on appellant by depositing three copies of same in the United States mail, first class postage prepaid, on March 31, 1978, addressed to counsel for appellant, Hon. James J. Varellas, Varellas and Varellas, Suite 300, Court Plaza, 266 West Main Street, Lexington, Kentucky 40507.

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